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# RESOLVING THE QUALIFIED IMMUNITY DILEMMA: CONSTITUTIONAL TORT CLAIMS FOR NOMINAL DAMAGES

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## Abstract

Scholars have criticized the Court's qualified immunity decision in *Pearson v. Callahan* on the ground that it may lead to stagnation in the judicial elaboration of constitutional norms. Under current law, officers sued in their personal capacity for constitutional torts enjoy qualified immunity from liability unless the plaintiff can persuade the court that the conduct in question violated clearly established law. *Pearson* permits the lower courts to dismiss on the basis of legal uncertainty; it no longer requires the courts to address the merits of the constitutional question.

This essay suggests that constitutional tort claimants should be permitted to avoid the qualified immunity defense by pursuing claims for nominal damages alone. Such nominal claims have a lengthy pedigree, both as a common law analog to the declaratory judgment, and as a remedy for constitutional violations. Because they do not threaten to impose personal liability on official defendants, nominal claims should not give rise to a qualified immunity defense. By seeking only nominal relief, litigants could secure the vindication of their constitutional rights in cases where legal uncertainty might otherwise lead to a dismissal. Such a regime would advance the acknowledged interest in maintaining a vibrant body of constitutional law without threatening to impose ruinous liability on the officials named in the complaint.

* Owen L. Coon Professor of Law, Northwestern University School of Law. Thanks to my colleagues at the Northwestern law faculty workshop, to Tom Lee and the Federal Courts section of the AALS and to Fred Bloom and the Brooklyn Law School faculty workshop (where I presented early versions of this paper); to Tara Grove, John Jeffries, Scott Nelson, Alex Reinert, David Shapiro, and Joan Shaughnessy for comments on a draft; to John Goldberg for sparking my interest in the subject; and to the *Bivens* staff at the Department of Justice for the invitation to participate in a July 2010 program on personal liability litigation at which I refined the ideas in this paper. Thanks as well to the Northwestern faculty fund for research support.

## RESOLVING THE QUALIFIED IMMUNITY DILEMMA: CONSTITUTIONAL TORT CLAIMS FOR NOMINAL DAMAGES

With the rise of constitutional tort litigation in the 1960s and 1970s, the Supreme Court has taken an active role in shaping (and re-shaping) the law of official liability and immunity. The Court began with state and local officials in 1961, relying upon a ninety-year old statute as the vehicle for imposing constitutional tort liability.[1] A decade later, the Court brought federal officials under a similar regime by recognizing an implied federal right of action for violations of the Fourth Amendment.[2] In both instances, the right of action confronts government officers with personal liability for violating the constitutional rights of the plaintiff.[3] The Court's handiwork thus promised to deter official wrongdoing and to compensate victims of unconstitutional conduct.[4]

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[1] For suits against state officials, see *Monroe v. Pape*, 365 U.S. 167 (1961) (authorizing individuals to pursue constitutional tort claims against city police officers under the civil rights act of 1871 (now codified at 42 U.S.C. § 1983) and rejecting the argument that the statute applied only to attacks on state custom or policy). For an account, see Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago: Monroe v. Pape as Legal Noir* in Civil Rights Stories (Risa Goluboff & Myriam Gilles, eds. 2007). On the growth of section 1983 litigation, see Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 955-56 (6th ed. 2009) [hereinafter H&W].

[2] The Court recognized a federal common law right of action against federal officials for violation of the Fourth Amendment in *Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* has attracted a good deal of scholarly interest in recent years, no doubt in part due to its significance as a vehicle for constitutional challenges to various elements of the war on terror. *See, e.g.*, George D. Brown, *Counter-Counter-Terrorism Via Lawsuit*, 82 S. Cal. L. Rev. 841 (2009); Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Implications for the Individual Liability Model*, 62 Stan. L. Rev. 809 (2010); John F. Preis, *Constitutional Enforcement by Proxy*, 95 Va. L. Rev. 1663 (2009). *See also* James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents* in FEDERAL COURTS STORIES (V. Jackson & J. Resnik eds. 2009) [hereinafter *The Story*]. Courts view section 1983 as creating the right of action against state officials, and thus do not engage in the case-by-case analysis of right of action issues that characterizes the Court's recent approach to *Bivens* claims. For an account of *Bivens* developments and an argument for consistent treatment of the two forms of litigation at both the right-of-action and other stages of the litigation, see James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117 (2009).

[3] Thus, in *Bivens*, for example, the federal officers eventually settled the case by writing personal checks to the plaintiff. The government provided an attorney but did not indemnify the officers for the settlement payment. *See* Pfander, *The Story*, supra note 2, at 282, 288-89. *See also* Carlson v. Green, 446 U.S. 14, 21 (1980) (describing the remedy as recoverable against individuals). For an emphatic restatement of the personal nature of constitutional tort liability, see Del Raine v. Carlson, 826 F.2d 698, 704 (7th Cir. 1987). Personal liability avoids the doctrine of

Yet personal liability also threatened the financial security of well-meaning public officials. To moderate that threat, the Court hit upon a doctrine of qualified immunity.[5] Initially, the Court focused on the mental state of the official: actions taken in good faith and within the zone of official discretion were immunized from liability.[6] But in an effort to scale back the burden of official liability, the Court eliminated the inquiry into subjective good faith and switched

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sovereign immunity, which would apply if the judgment ran against either the state or federal government. *See* Edelman v. Jordan, 415 U.S. 651 (1974) (action nominally against state official that would require payments from the state treasury implicates the state's sovereign immunity); Larson v. Domestic & For. Commerce Corp., 337 U.S. 682 (1949) (federal sovereign immunity bars suit against federal officer to bar transfer of disputed property). For an account of the interplay of the interplay between official liability and sovereign immunity in the early Republic, see James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U.L. REV. 1862 (2010). As noted there, official liability was often ameliorated by the government's indemnification of the officer, implemented by petition to Congress for the adoption of a private bill. *Id*. at 1905 (finding that officers petitioning for indemnifying legislation were successful in roughly 60% of the cases). Today, the Department of Justice has a practice of indemnifying its officers only when they act within the scope of their employment and only where doing so would be in the "interest of the United States." 28 C.F.R. 50.15(c). Any amount in excess of $100,000 requires the Attorney General's approval (a much more demanding approval standard than under the Federal Tort Claims Act, where lower level officials enjoy settlement authority of $1 million).

[4] Of course, just how well constitutional tort litigation performs its office of deterrence and compensation remains a matter of dispute. *Compare* Peter Schuck, Suing Government: Citizen Remedies for Official Wrongs (1983) (advocating reliance on liability that runs against the government as an entity rather than against its officials) *with* Reinert, supra note 2, at (defending the regime of official liability).

[5] The history of qualified immunity has not been fully told. My own research indicates that the absence of qualified immunity at common law reflects a perception that the government was obligated to indemnify its officers against any personal liability they incurred in the course and scope of their official duties. *See* Pfander & Hunt, supra note 3, at 1912-13 (invoking the language of contractual obligation in explaining that, in cases of official liability, the government is "bound" to indemnify the officer and thereby eliminate any personal hardship). Early applications of what evolved into qualified immunity were drawn from privileges. Thus, in *Spalding v. Vilas*, 161 U.S. 483 (1896), the Court held that the postmaster general was entitled to claim a privilege from defamation liability for injurious statements made in the course of his duties. Later cases, including *Gregoire v. Biddle*, 177 F.2d 570 (2d Cir. 1949), and *Barr v. Mateo*, 360 U.S. 564 (1959), also look to common law privileges in defining federal official immunity from suit.

[6] *See* Pierson v. Ray, 386 U.S. 547, 556-57 (1967) (analogizing claim to one for false arrest and drawing on common law defenses of good faith and probable cause to define the official's immunity). *See also* Procunier v. Navarette, 434 U.S. 555 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974). *Cf*. Gomez v. Toledo, 446 U.S. 635 (1980) (treating qualified immunity as an affirmative defense and casting the burden of pleading on the defendant). *But cf*. Hartman v. Moore, 547 U.S. 250 (2006) (assigning to the plaintiff in a malicious prosecution claim the burden of pleading and proving that the defendant acted without probable cause).

to an objective inquiry into the clarity with which the constitutional rights in question were established.[7] Immunity's focus on the clarity of the legal norm transformed constitutional tort litigation.[8] Modern qualified immunity law now entails a two-step judicial inquiry: did the official violate the law and was that law articulated with the clarity needed to overcome the immunity defense.[9]

This two-step inquiry confronts federal courts with a familiar dilemma. If the law's lack of clarity would support an immunity defense, the court can readily dispose of the case after reaching that conclusion. But such a disposition leaves the law unsettled; it fails to give future officials and the individuals with whom they deal a clear idea about what the law permits and forbids.[10] In other words, dispositions based on the law's lack of clarity serve the interest in minimalist decision-making and constitutional avoidance, but do little to clarify the law.[11] The Court's struggle to resolve this dilemma has given rise to a debate over what has come to be known as the order of battle in constitutional tort litigation.[12]

The Court's first attempt to resolve the order-of-battle dilemma did not endure. In *Saucier v. Katz*, the Court insisted that lower courts address the constitutional issue first and only then decide if the law was well enough established to overcome official immunity.[13] But such enforced inquiries into the

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[7] *See* Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982). On the difficulty of conducting this inquiry into the content of "clearly established" law, see John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*, 62 Fla. L. Rev. 851, 854 (2010) (describing the doctrine as a source of "much confusion and instability").

[8] For example, the switch to an objective standard eventually led the Court to cast the burden of pleading immunity on the plaintiff. The plaintiff's obligation to plead a violation of clearly established law was clarified in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, (2009). For an account, see James E. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN. STATE L. REV. 1387 (2010).

[9] *See* Pearson v. Callahan, 129 S. Ct. 808 (2009).

[10] Similar dilemmas often confront practitioners of the art of minimalism. See Neil S. Siegel, A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar, 103 Mich. L. Rev. 1951, 2005 (2005) (criticizing minimalism for its failure to provide adequate guidance to lower courts and practitioners).

[11] *See* Jack M. Beermann, *Constitutional Avoidance and Qualified Immunity*, 2009 Sup. Ct. Rev. 139 (noting that constitutional avoidance may conflict with the need for clarity).

[12] *See* John C. Jeffries, Jr., *Reversing The Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115; Michael Wells, *The Order of Battle in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539 (2007).

[13] *Saucier v. Katz*, 533 U.S. 194 (2001) (requiring that courts first reach the constitutional question and only then decide if the law was established with the clarity needed to overcome

content of constitutional law encountered resistance from the lower courts. In addition, critics of the *Saucier* approach identified such concerns as the problem of advisory opinions,[14] the difficulty of addressing some novel constitutional issues, and the potentially awkward posture of cases awaiting further review at the Supreme Court.[15] The Court accordingly changed course. In *Pearson v. Callahan*, the Court restored the lower courts' discretion to dismiss on legal uncertainty grounds without definitively resolving the constitutional claim.[16] Scholars have expressed concern that constitutional law will stagnate and that lower courts will struggle with the grant of standard-less discretion apparently recognized in *Pearson*.[17]

Litigants, meanwhile, may find it difficult to secure a vindication of their rights, as the case of the Guantanamo detainees tends to confirm.[18] To be sure,

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qualified immunity). The *Saucier* regime was anticipated in such cases as *Wilson v. Layne*, 526 U.S. 603, 609 (1999), where the Court emphasized the importance of reaching a decision on the merits to promote "clarity" for the "benefit of both the officers and the general public."

[14] *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*,83 N.C. L. Rev. 847 (2005) (arguing that the merits-first order of battle produced constitutionally dubious advisory opinions); *but cf*. Beermann, supra note 11, at 151-53 (dismissing the concern with the advisory quality of a decision to reach the merits); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking*, 15 Geo. Mason U. L. Rev. 53, 59-68 (2008) (describing a variety of doctrines, such as harmless error and ineffective assistance of counse, in which the Court has either required or permitted merits-first decisionmaking).

[15] For a summary of these difficulties, see Pearson v. Callahan, 555 U.S. __ (2009)

[16] *See* Pearson v. Callahan, 555 U.S. __ (2009) (substituting a regime of discretion for the mandatory decision order in *Saucier v. Katz*, 533 U.S. 194 (2001)). Both *Pearson* and *Saucier* were brought under section 1983 against officials acting under color of state law. But the Court has long taken the view that the same rules of qualified immunity apply to both *Bivens* and section 1983 claims. *See Pearson*, 555 U.S. at __ (treating federal and state immunity precedents interchangeably); Wilson v. Layne, 526 U.S. 603, 609 (1999) (noting that "qualifed immunity analysis is identical" for claims under section 1983 and *Bivens*); Butz v. Economou, 438 U.S. 478, 504 (1978) (describing as "untenable" the proposed extension of broader immunity to federal than to state officials); *cf*. Hartmann v. Moore, 547 U.S. 250, 254 n.2 (2006) (noting the analogous relationship between the elements of section 1983 and *Bivens* claims).

[17] For a critique, see Jeffries, supra note 12, at 131 (arguing that courts should reach the merits first in doctrinal contexts where other modes of constitutional redress have little salience). For a response, see Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 Nw. U. L. Rev. Colloq. 135, 144-48 (2010) (portraying clarity as one goal among many that constitutional adjudication should strike to attain). For a critique of discretion, see Beermann, supra note 11, at 171-78; Wells, supra note 12, at 1565.

[18] On the difficulties that Guantanamo detainees and other targets of war-on-terror detention have faced in securing compensation from the federal government, see George D. Brown, *Accountability, Liability, and the War on Terror: Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 Fla. L. Rev. 193 (2011).

litigants can pursue other modes of constitutional redress. Detainees can petition for habeas relief,[19] victims of unconstitutional searches can move to suppress damaging evidence,[20] and those who face threatened or ongoing violations of their constitutional rights can sue for declaratory and injunctive relief.[21] But in many cases, these remedial alternatives will have little relevance. Detainees released from confinement cannot pursue habeas relief, just as suspects cannot pursue suppression after the charges have been dropped.[22] Many constitutional tort plaintiffs face not a threatened or ongoing violation but a one-off event that affected them in the past and will not (under modern standing and ripeness decisions) support a claim for injunctive or declaratory relief.[23] For these plaintiffs, including Webster Bivens himself, damages provide the only possible remedy.[24] Extending qualified immunity can deprive individuals of their only effective mode of redress and their only opportunity for vindication.

To address the stagnation and vindication threats posed by qualified immunity, this brief essay suggests the revival of an old model of litigation: the suit for nominal damages. The suit for nominal damages arose at common law to enable litigants to secure the judicial resolution of a claim of right even in circumstances where the plaintiff did not seek, or could not establish a claim to,

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[19] *See* Boumediene v. Bush, 553 U.S. 723 (2008) (concluding both that aliens at Guanatanamo Bay have a right to contest the legality of detention by way of habeas and that Congress acted unconstitutionally in immunizing executive detention from searching federal judicial review).

[20] The suppression remedy has been undercut through the recognition of a good faith exception, but has not been overturned. *See* Herring v. United States, 129 S. Ct. 695 (2009) (applying the good faith exception to the exclusionary rule); *cf.* Hudson v. Michigan, 547 U.S. 586 (2006) (announcing, albeit in dicta, that the exclusionary rule had outlived its usefulness).

[21] On the right to sue for injunctive relief against unconstitutional state action, see *Ex parte Young*, 209 U.S. 123 (1908). On the extension of the *Young* principle to suits challenging federal action, see *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938). For an account of constitutional litigation under the Administrative Procedure Act, see H & W, supra note 1, at 858-59.

[22] Habeas relief extends only to those in custody, although the custody requirement has been relaxed somewhat in the last fifty years. *See* 28 U.S.C. § 2241(c); Garlotte v. Fordice, 515 U.S. 39 (1995). *See generally* H & W, supra note 1, at 1301–03. Dismissal of charges will moot any motion to suppress evidence in support of such charges.

[23] *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (allowing victim of police chokehold to sue for damages but not for injunctive relief against city policy); cf. O'Shea v. Littleton, 414 U.S. 488 (1974) (rejecting pattern-or-practice challenge to the administration of city's criminal justice system on the basis of an apparent preference for case-by-case rather than systemic assessment).

[24] In Justice Harlan's memorable phrase, it was "damages or nothing." *Bivens*, 403 U.S. at (Harlan, J., concurring).

compensatory damages.[25] An award of nominal damages signified the invasion of a legal right in circumstances in which the plaintiff either failed to prove actual damages or chose to waive compensatory damages and pursue the nominal claim alone. In any case, the court had the power to adjudicate the legal question and award judgment. If the plaintiff was successful, the decision was entitled to preclusive effect and the defendant was obliged to pay the costs of the litigation.[26] With its emphasis on securing the resolution of a question of law, one can readily see why the suit for nominal damages has often been described as an early precursor to the declaratory judgment action.[27]

Building on these early foundations, this essay proposes that *Bivens* and section 1983 litigants should be entitled to obtain a determination of their constitutional claims by initiating a suit for nominal damages against the responsible officer.[28] Although it would promise little by way of compensation, such a nominal damages claim could be an attractive option for plaintiffs who wish to secure judicial vindication. By expressly declaring in the complaint that they do not intend to seek and will not accept any compensatory or punitive damages, or an award of costs and attorney's fees (and thereby confining themselves to nominal damages alone), plaintiffs would waive the money damages aspect of constitutional tort litigation that threatens official defendants

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[25] See Part IIA infra.

[26] One frequent trigger of nominal damages litigation was a dispute about property ownership. The trespass action for nominal damages would enable the court to resolve the ownership issue, even in the absence of any actual damages. *See, e.g.*, Gaffny v. Reid, 628 A.2d 155, 158 (1993) (confirming the presumptive right of plaintiffs to recover nominal damages on showing a legal injury to a real property right); Tillotson v. Smith, 32 N.H. 90 (1855) (upholding propriety of nominal damages for any infringement of property rights, especially where continued wrongs could result in an easement or encumbrance); *see generally* GEORGE W. FIELD, A TREATISE ON THE LAW OF DAMAGES, 679-82 (1881) (describing use of action for nominal damages to prevent an easement from arising through uncontested adverse possession).

[27] *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 221-222 (1993) (characterizing the action for nominal damages as the functional equivalent of a declaratory judgment action).

[28] As noted above, *see* note 16 supra, the Court has long treated the section 1983 and *Bivens* claims as analogous and has applied the same rules of qualified immunity to both. As a consequence, the suggested inapplicability of qualified immunity to the nominal damages claim should apply with equal force to both forms of constitutional litigation. The text often focuses on developments in *Bivens* litigation but does not intend to suggest that its proposal applies only to such claims. So far, I have not found any discussion of the interaction of nominal damages and qualified immunity in the scholarly literature, aside from the reference in Pamela Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 Fordham L Rev. 1913 (2007).

with personal liability.[29] By removing the threat of personal liability, and with it much of the justification for qualified immunity, the suit for nominal damages would allow the plaintiff to secure a constitutional decision even where the law was not clearly established.[30]

Such an immunity-free nominal damages claim could contribute much to the clarity and flexibility of constitutional tort litigation. In a variety of cases involving unprecedented government wrongdoing, as with cases brought to challenge detention or torture at Guantanamo Bay, the suit for nominal damages would enable the federal courts to clarify the law without threatening the low-level (or high-level) officers who carried out the challenged policy.[31] A finding that the government violated the individual's constitutional rights would provide a measure of vindication, even if it did not provide make-whole relief. Moreover, the judicial inquiry in such cases could focus on the content of constitutional law rather than on the often-complex question whether the norms in question can be regarded as clearly established.

Recognition of an immunity-free constitutional tort action for nominal damages would closely resemble two well-established forms of constitutional litigation: habeas petitions to challenge the legality of custody and suits for

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[29] As noted above, that doctrine arose in the 1970s to protect government officials from the threat of personal liability that could dampen their willingness to enforce the law or accept government employment. The Court has expressed concern that the threat of liability "'will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.'" Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)). *See also* Butz v. Economou, 438 U.S. 478, 506 (1977) (noting the importance of encouraging "the vigorous exercise of official authority"); *cf.* Wilson v. Layne, 526 U.S. 603, 618 (1999) (emphasizing the importance of clearly established law in avoiding the unfairness of subjecting police officers to monetary liability for picking the wrong side in a controversy).

[30] As explained below, the qualified immunity doctrine arose to protect officers sued in their personal capacity but was later expanded out of concern with the burdens associated with the litigation process. I evaluate the burden of litigation argument below. *See* part IIB.

[31] Indeed, the Court has revitalized the immediate custodian rule in habeas litigation, ensuring that the nominal defendant in such actions will normally be the person directly in charge of the petitioner's confinement. *See* Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004) (reaffirming the longstanding, if episodically applied, requirements in habeas litigation that the petitioner pursue relief in the district of confinement and do so by action against the immediate custodian). Nonetheless, the Court has recognized that habeas puts into issue the legality of confinement decisions made at the highest levels of government and does not pose any threat to the officer named.

injunctive and declaratory relief against allegedly unconstitutional government policies. Both models of constitutional adjudication rest on the so-called *Ex parte Young* fiction and the notion that a suit brought against an officer in his official capacity puts into issue the legality and constitutionality of the government's conduct.[32] In responding to habeas petitions and *Ex parte Young* type actions, the federal and state governments provide an attorney to defend the action and the officer serves merely as a nominal defendant.[33] Such litigation casts a burden on the government and its officials, obliging the agency to prepare a legal defense and accept a possible declaration of constitutional invalidity.[34] But despite these burdens, the habeas and *Ex parte Young* actions do not trigger the application of qualified (or sovereign) immunity.[35] The suits thus precipitate a determination of

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[32] On the role of *Ex parte Young*, 209 U.S. 123 (1908) in permitting suits to enjoin government officials from violating the Constitution, see James E. Pfander, PRINCIPLES OF FEDERAL JURISDICTION 186-90 (2d ed. 2011). On the linkage between the reliance on officer suits in habeas and *Ex parte Young* proceedings, see Carlos Vazquez, *Night and Day*: Coeur D'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 Geo. L.J. 1, 62-66 (1998) (connecting the habeas exception to the Eleventh Amendment to the *Ex parte Young* exception for injunctive relief); Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 Am. Bankruptcy L.J. 461, 507-11 (2002) (linking the use of habeas relief to free debtors from prison in respect of discharged debts to the use of injunctions against government officials under *Ex parte Young*).

[33] The Department of Justice has created separate offices to oversee official and personal capacity litigation against government officers. Official capacity suits, typically actions seeking injunctive, declaratory or perhaps mandamus relief, are handled by the Federal Programs Branch of the Department; the government provides counsel as a matter of course. Personal capacity suits, by contrast, are handled by the the Constitutional and Specialized Torts Section of the Department of Justice office and by attorneys in the field. Legal representation in such suits requires a written request from the agency head and a finding that representation will further the interests of the federal government. A separate office handles immigration matters and yet another branch handles tort claims under the Federal Tort Claims Act. On occasion, a single piece of litigation (such as *Iqbal v. Ashcroft*) includes allegations broad and serious enough to command the attention of all four offices. See Notes dated March 16, 2010 of a Conversation Between James E. Pfander and Timothy Garren, Director, Department of Justice (copy on file with author). Any eventual indemnification of an official defendant requires a second petition and a finding that indemnity would further the interests of the United States. *See* note 3 supra.

[34] Thus, for example, the government routinely supplies counsel to defend the low-level (and high-level) officers named as defendants in petitions for habeas relief from ongoing detention. In *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004), the Court insisted that the suit proceed against the immediate custodian of the habeas petitioner but did not suggest that the identity of a nominal defendant posed any obstacle to the adjudication of the claim of right.

[35] See County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (observing that qualified immunity does not apply in an action "to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion").

the legal question without any inquiry into whether the constitutional rule was clearly established.[36]

The suit for nominal damages would resemble these proceedings in virtually every relevant respect. The officer would appear as a nominal defendant, facing liability on the order of $1.00.[37] The government would appear to defend the action, at least so long as the officer had acted in the course or scope of employment in pursuing allegedly unconstitutional conduct.[38] The judgment would bind the officer and would establish a binding precedent, helping to define the scope and limits of proper government action.[39] In the meantime, where

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[36] To be sure, the Court has held that habeas relief on post-conviction review of state criminal proceedings should be awarded only when the constitutional rule at issue was clearly established, a norm that was later enacted into positive law. *See* Teague v. Lane, 489 U.S. 288 (1989); *see also* 28 U.S.C. § 2254(d) (authorizing habeas relief only where the state court decision was contrary to or an unreasonable application of clearly established decisional law at the Supreme Court level). But limits on post-conviction review do not apply to habeas petitions that seek to challenge executive detention, such as those filed by the Guantanamo detainees.

[37] While some courts have approved nominal awards of up to $100, see, e.g., Gaffny v. Reid, 628 A.2d 155, 158 (1993) ($100), the Supreme Court's approach has been to award one dollar. *See* Carey v. Piphus, 435 U.S. 247, 266-67 (1978). A more common figure in the early nineteenth century was six cents. *See, e.g.*, Tracy v. Swartwout, 35 U.S. 80, 94 (describing the award of $.06 in nominal damages); Stewart Rapalje & Robert L. Lawrence, 1 Dictionary of American and English Law 336 (1888) (six cents).

[38] Federal regulations provide for the government to provide representation to officers named in their individual capacity, so long as the action arose from conduct that reasonably appears to have occurred "within the scope of the employee's employment" and the Attorney General or his designee determines that providing representation would otherwise be "in the interest of the United States." 28 C.F.R. 50.15(a). This duty to provide representation would attach to virtually all conceivable constitutional tort claims for nominal damages, which by definition seek to test the constitutionality of action taken by the government. Such claims will likely focus on the government policies and their application in the particular case and pose little threat that government officials will be viewed as having acted outside the scope and thereby obliged to shoulder the financial and emotional burden of arranging for their own defense.

[39] The government might respond to nominal claims by refusing to defend the action and allowing a default judgment to enter against the defendant official. Such a strategy could result in the entry of a binding judgment, although the amount would be limited to the nominal sum of $1.00. By thus attempting to pretermit any judicial determination of the content of constitutional law, the government might attempt to draw the teeth from any such litigation. Yet three factors would seem to lessen the payoff to a government default strategy. First, the government might not be able to accept the political fallout associated with the entry of a default judgment in a high-profile case. (President Bill Clinton, for example, was reportedly advised to consider allowing a default judgment to enter against him in the Paula Jones litigation, but found it difficult advice to accept.) Second, the plaintiff might counter the possibility of default by seeking, in addition to nominal damages, a declaratory judgment to the effect that constitutional rights were violated. Such a request would presumably require the district court to enter the default under the Federal

existing precedents formed a body of law that came to be regarded as clearly established within the meaning of qualified immunity law, victims could recover compensatory and punitive damages for a proven violation. Constitutional law could continue to evolve without a threat of stagnation, providing guidance to the government and public alike, and government officials would continue to enjoy immunity from personal liability except in cases where they violated clearly established norms.

This essay develops its proposal for the recognition of an immunity-free constitutional tort action for nominal damages in three short sections. Part I briefly traces the well-known problems with *Bivens* litigation, now compounded by restrictive approaches at both the right-of-action and qualified immunity phases of the analysis. Part II sets out the terms of the suggested action for nominal damages, drawing on the common law history of such proceedings, showing that claimants may seek such damages in modern constitutional tort litigation, and exploring the implications of such claims for the doctrine of qualified immunity. Part III seeks to allay predictable concerns and to describe unexpected benefits that might flow from the proposal. A brief conclusion follows.

## I. THE CHALLENGES OF CONSTITUTIONAL TORT LITIGATION

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Rules of Civil Procedure. *See* Fed. R. Civ. P. 55(b)(2). Moreover, the rules prohibit the entry of any default judgment against the government or its officers unless the plaintiff "establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(e). The rules therefore provide the legal foundation for regarding any default judgment as an adjudication of the claim on the merits and minimizes the government's ability to deprive the judgment of any precedential effect.

Some may worry that defendants could escape nominal litigation with an offer of judgment under Rule 68. Such offers put some pressure on litigants to settle by imposing the costs of litigation on any plaintiff that refuses to accept an offer and recovers a judgment of lesser value. *See* Fed. R. Civ. P. 68(d). Notably, plaintiffs in nominal litigation seek both an award of damages and a declaration that the plaintiff's rights were violated. Courts have recognized that such non-monetary elements must be considered in determining whether the final judgment is more or less favorable than the offer. *See, e.g.*, Reiter v. New York Transit Auth., 457 F.3d 224, 231 (2d Cir. 2006) (concluding that a favorable judgment coupled with injunctive relief can be "more valuable to a plaintiff than damages"). *See generally* Thomas L. Cubbage, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 Tex. L. Rev. 465 (1991). As a consequence, an offer of money alone, unaccompanied by declared rights violation, would not trigger Rule 68's cost-shifting apparatus.

At least four important barriers confront the plaintiff seeking to impose constitutional tort liability on officers of the federal government.[40] First, the plaintiff must persuade the court to recognize the existence of a right of action.[41] Second, the plaintiff must overcome the predictable qualified immunity defense.[42] Third, the plaintiff must meet the more demanding plausibility pleading standard to which the Court gave voice in *Twombly* and *Iqbal*.[43] Fourth, the plaintiff must defend any favorable determination at the appellate level;[44] the Supreme Court

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[40] Plaintiffs bringing suit under section 1983 do not face all of these hurdles. First, the Court views section 1983 as an all-purpose vehicle for constitutional tort claims and does not conduct a *Bivens*-like inquiry into the recognition of a right of action. *See* Pfander & Baltmanis, *supra* note 2, at 141. Second, while state law may provide an alternative set of remedies, state and local defendants have difficulty arguing that state law impliedly displaces section 1983 claims. Indeed, in *Haywood v. Drown*, 556 U.S. __ (2009), the Court concluded that state courts must entertain section 1983 claims even where state law purports to substitute a suit against the state government itself and insulate prison officials from personal liability litigation.

[41] On the difficulty of persuading the court to recognize new rights of action, see *Wilkie v. Robbins*, 551 U.S. __ (2007) (describing a two-step process that considers the availability of other remedies, congressional signals, and special factors); *see generally* Pfander & Baltmanis, *supra* note 2, at 126-30 (describing a shift from the routine recognition of *Bivens* actions to the more selective approach taken by the current Court).

[42] Although styled a defense, qualified immunity influences litigation at the threshold, requiring the plaintiff to anticipate the defense and plead facts that show a violation of clearly established constitutional law. *See* Iqbal v. Ashcroft, 129 S. Ct. 1937, __ (2009) (requiring that the complaint allege sufficient facts that, if taken as true, "states a claim that [government officials] deprived [plaintiff] of his clearly established constitutional rights"); *see generally* Pfander, *supra* note 8, at 1389 (describing *Iqbal*'s view that plaintiff must plead a violation of clearly established law). One can argue that *Iqbal*'s discussion of the issue was dicta and should not be regarded as resolving a lower court division on the burden-of-pleading question. For a flavor of the debate, compare Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007) (casting the burden on plaintiff to defeat a qualified immunity defense) with Monroe v. Arkansas State University, 495 F.3d 591, 594 (8th Cir. 2007) (once plaintiff identifies clearly established law, defendant bears the burden on all elements of the defense). See generally Alexander Reinert, __ St. Thomas L. Rev. __ (forthcoming 2011).

[43] For an evaluation of *Iqbal*'s importance in national security litigation, see Steven I. Vladeck, National Security and Bivens After Iqbal, 14 Lewis & Clark L. Rev. 255 (2010). See also Pamela S. Karlan, *Shoe Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. Rev.875 (2010).

[44] Although the Court has cut back somewhat on the availability of interlocutory review at the behest of the federal government, *see, e.g.*, Will v. Hallock, 546 U.S. 345 (2006) (refusing to permit interlocutory review of the denial of a motion to dismiss on judgment-bar grounds), the government may still appeal from the district court's denial of its motion to dismiss on qualified immunity grounds. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

has long viewed denial of a qualified immunity defense as the sort of collateral order that qualifies for immediate appellate review.[45]

Success on all these fronts may entitle the plaintiff to discovery and the possibility of a jury trial on liability. But other pitfalls await. If the plaintiff pursues an FTCA claim against the federal government, the judgment bar may preclude *Bivens* liability.[46] Finally, the plaintiff may have trouble collecting the judgment. The government takes the position that indemnity should not be made routinely available for officers subjected to personal liability under *Bivens*. As a result, the plaintiff cannot rely on the government to pay judgments obtained against its officials (even where they act within the course and scope of their employment). Indemnity requires an additional finding that payment would serve the interests of the government.[47] The Department of Justice does not make public any record of its administrative indemnity practice, perhaps in part due to a concern that litigants will come to rely on its availability in bringing suit against government officials.[48]

Despite recent evidence of a somewhat surprising (and contested) success rate,[49] *Bivens* litigation has been singularly unsuccessful in securing a

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[45] *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

[46] *See* Manning v. United States, 546 F.3d 430 (7th Cir. 2008) (vacating $6.5 million *Bivens* judgment under the terms of the judgment-bar doctrine after plaintiff unsuccessfully sought to impose liability on the government under the FTCA). The Court has yet to decide how broadly to apply the judgment bar to other *Bivens* litigation. Many *Bivens* litigants will file claims under the FTCA if only to trigger access to settlements payable from the Judgment Fund. In the *Iqbal* litigation itself, the complaint sought damages from high government officials on a *Bivens* theory, but was reportedly settled on the basis of FTCA claims. See generally James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, __ St. Thomas L. Rev. __ (forthcoming 2011) (arguing on textual and historical grounds that the FTCA's judgment bar does not apply to *Bivens* claims).

[47] The Department of Justice takes the view that indemnity will normally be paid only after the entry of a *Bivens* judgment and only where a finding is made that the payment of indemnity will serve the best interests of the federal government. Moreover, it requires the personal approval of the Attorney General of the United States to approve an indemnity request in excess of $100,000. (In contrast, department heads can approve an FTCA settlement of $ 1 million.) Today's restrictive attitude towards indemnity represents a significant departure from the early days of the nineteenth century, when Congress, the executive, and the courts regarded the federal government as duty-bound to indemnify federal officials for any liability imposed on them in their personal capacity while acting in the course and scope of employment. *See* Pfander & Hunt, supra note 3, at __.

[48] For an account of the government's indemnity practices, see Cornelia Pillard, ().

[49] See Reinert, supra note 2, at 841 (reporting a success rate of 30%).

constitutional test of the legality of such controversial post-9/11 government policies as extraordinary rendition, military detention,[50] and harsh interrogation practices at Guantanamo Bay. While these claims have failed for a wide variety of reasons, including special factors analysis[51] and expansive application of the state secrets privilege,[52] qualified immunity has played a contributing role.[53] On the whole, the decisions tend to confirm what Professor Richard Seamon found some years ago.[54] After evaluating a range of possible modes of redress, Seamon concluded that there was little chance of securing an adjudication of the constitutionality of the federal government's interrogation policies under current law.[55]

## II. THE ELEMENTS OF AN IMMUNITY-FREE NOMINAL CLAIM

In suggesting greater reliance on suits for nominal damages, this essay proposes to revive a mode of redress that has deep roots in the common law and a long history of acceptance in constitutional tort litigation. In this part, the essay sketches the broad acceptance of nominal damages, and then explains why such a claim, standing alone, should not give rise to a qualified immunity defense.

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[50] See Padilla v. Yoo, 633 F. Supp. 2d 1005 (2009) (permitting citizen to challenge confinement in military detention and rejecting the government attorney's qualified immunity defense) (appeal pending).

[51] *See* Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2010) (en banc) (special factors counsel hesitation in recognition of *Bivens* action to contest extraordinary rendition).

[52] *See, e.g.*, El-Masri 479 F.3d 296 (4th Cir. 2007) (dismissing a *Bivens* action for extraordinary rendition after concluding that the state secrets privilege applied to the claims and defenses and made a fair trial impossible); Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009) (state secrets privilege bars suit against government contractor for providing flight services in support of extraordinary rendition program) (rehearing en banc granted). The Military Commission Act may play a role as well, foreclosing claims for damages arising out of detention at Guantanamo Bay. See 28 U.S.C. § 2241(e)(2).

[53] *See* Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) (holding that qualified immunity defeats *Bivens* action to challenge confinement at Guantanamo Bay). Nonetheless, one can argue that some areas of law remained clear in the wake of 9/11, thereby enabling litigants to pursue *Bivens* claims in the face of qualified immunity. See

[54] See Richard Henry Seamon, *U.S. Torture as a Tort*, 37 Rutgers L.J. 715 (2006). Professor Seamon evaluated potential liability under a variety of statutes, including the FTCA and the Alien Tort Statute. *Id*. at 753-54.

[55] *Id*. at 791-97 (concluding that even if torture to secure intelligence would violate constitutional norms, executive directives may have created uncertainty about the content of law that would trigger the application of qualified immunity defenses for those who carried out the torture).

Finally, this part sketches the practical realities that will likely shape the new nominal *Bivens*/1983 claim.

### *A. Nominal Damages and Constitutional Torts*

According to recent scholarship, actions for nominal damages extend as far back as the fourteenth century.[56] Certainly they were very much a part of the English common law legacy and quickly left their mark on law practice in early republic America.[57] The antebellum Supreme Court, in particular, accepted the viability of nominal damages claims, including claims brought to impose liability on federal government officials.[58] More recently, with the rise of constitutional tort litigation in the twentieth century,[59] the Court has confirmed the availability of nominal damages in cases where the victim of unconstitutional government conduct can prove an invasion of legal rights but cannot establish consequential damages.

In a leading modern case, *Carey v. Piphus*,[60] the Court explicitly drew on the common law of tort remedies in deciding the proper measure of compensation for an invasion of the plaintiff's constitutional rights. Although the plaintiffs showed that they had been suspended from high school without a hearing in violation of their procedural due process rights, the Court refused to presume that they suffered any compensatory damages.[61] The Court nonetheless expressly held

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[56] *See* F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 281-85 (2009) (tracing origins of nominal damages to English yearbook reports from 1348 and exploring subsequent common law developments).

[57] *See* Hessick, *supra* note 56, at 281-85 (exploring use of nominal damages in the United States); *see also* JOHN D. MAYNE, A TREATISE ON THE LAW OF DAMAGES 4-8 (1872) (reporting that nominal damages are available as a remedy for any infringement of a legal right); C.G. ADDISON, WRONG AND THEIR REMEDIES: A TREATISE ON THE LAW OF TORTS 9-11 (1876) (same).

[58] *See, e.g.*, Boyden v. Burke, 55 U.S. (14 How.) 575, 583 (1852) (allowing plaintiff to pursue claim for nominal damages against federal officer who breached duty to provide plaintiff with certified copies of patent documents and making no suggestion that officer enjoyed any immunity from such suit); *cf.* Tracy v. Swartwout, 35 U.S. 80 (1836) (overturning nominal damages verdict against a collector of customs after concluding that trial judge erred in ruling out an award of actual damages; finding that collector would enjoy no immunity for actions taken in good faith and in line with instructions from his superior).

[59] *See* notes 1-2 supra (sketching origins of constitutional tort litigation).

[60] Carey v. Piphus, 435 U.S. 247, 248, 266-67 (1978).

[61] Plaintiffs argued that they were entitled to presumed damages for the wrongful suspension, even in the absence of proof that they suffered injury as a consequence of the deprivation. Common law norms provided some support for such a claim; courts allowed juries to award

that nominal damages were available to vindicate the constitutional right at issue. As the Court explained,

> By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to society that those rights be scrupulously observed; but at the same time it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.[62]

Having concluded that nominal damages were appropriate even in the absence of any showing of actual harm, the Court remanded for an award of "nominal damages not to exceed one dollar."[63]

Relying on *Carey*, the federal courts have recognized the availability of nominal damages for a broad range of constitutional tort claims. Among others, the courts have approved such awards for the (procedurally problematic) denial of prison good time credits[64] and the violation of first amendment rights to religious freedom and freedom of speech,[65] among others.[66] The routine availability of

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damages for intentional invasions of personal rights, such as trespass, battery, or defamation per se, without a showing of injury. But the Supreme Court did not embrace the idea of presumed damages. Instead, it focused on the principle that damages should compensate the victim for actual injuries. While the Court acknowledged the possibility that individual plaintiffs might prove that a due process violation caused them mental distress or other compensable injury, the plaintiffs had offered no such evidence. *See Carey*, 435 U.S. at 266.

62 *Carey*, 435 U.S. at 266.

63 *Id.* at 267.

64 *See* Edwards v. Balisok, 520 U.S. 641, 647 (1997) (upholding the imposition of nominal damages for procedural due process violation that led to wrongful denial of good time credits). Following the enactment of the Prison Litigation Act of 1995, prisoners can no longer recover damages for mental or emotional injury without showing that they suffered physical injury. See 42 U.S.C. 1997e(e). Courts have consistently held, nonetheless, that prisoners can pursue claims for nominal and punitive damages in such cases. *See* Mayfield v. Texas Dept of Criminal Justice, 529 F.3d 599, 606 (5th Cir. 2008); Calhoun v. DeTella, 319 F.3d 936, 941 (7th Cir. 2003) (Eighth Amendment claim).

65 *See* Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007) (nominal damages allowed for religious freedom claim under the first amendment); Lowry ex rel. Crow v. Watson Chapel School Dist., 540 F.3d 752, 764-65 (8th Cir. 2008) (upholding award of nominal damages for violation of free speech rights); see also Lewis v. Woods, 848 F.2d 649, 651 (5th Cir. 1988) (upholding award of nominal damages for first amendment violation); Draper v. Coombs, 792 F.2d 915 (9th Cir. 1986) (awarding nominal damages for extradition statute violations); Farrar v. Cain, 756 F.2d 1148, 1152 (5th Cir. 1985) (same; violation of "civil rights"); Smith v. Coughlin, 748 F.2d 783,

nominal damages suggests that plaintiffs can pursue such an award for most constitutional violations.[67] So far at least, the federal courts have shown no inclination to suggest that certain constitutional claims will not support an action for nominal damages.

Building on their broad acceptance as a remedy for constitutional torts, this essay suggests that a constitutional tort claim may proceed solely as an action for nominal damages. The plaintiff would simply announce in her complaint that, in suing for a constitutional violation, she seeks only to recover nominal damages and waives any claim for compensatory and punitive damages, costs and attorney's fees. A commitment to accept only nominal damages would clarify both to the government official named as the nominal defendant and to the government agency whose action the suit draws into question that the proceeding does not threaten to impose any personal financial liability. As a result, the agency and the official could treat the proceeding much the same way they would treat a suit for declaratory and injunctive relief against an ongoing constitutional violation.[68] The resulting proceedings pose no threat of loss to the named official and do not give rise to a qualified immunity defense.[69] The litigation would seek

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789 (2d Cir. 1984) (same; Sixth Amendment Rights); Kincaid v. Rusk, 670 F.2d 737, 746 (7th Cir. 1982) (same; First Amendment rights); Reyes v. Edmunds, 472 F. Supp. 1218, 1230 (D. Minn. 1979) (treating nominals as available in most constitutional tort cases).

[66] *See* Williams v. Kaufman County, 352 F.3d 994, 1014-15 (5th Cir. 2003) (upholding award of $100 in nominal damages for constitutional violation); Park v. Shifflet, 250 F.3d 843, 853-54 (4th Cir. 2001) (upholding award of nominal damages for wrongful arrest in the absence of any showing of actual injury); *see generally* Calhoun v. DeTella, 319 F.3d 936, 941 (7th Cir. 2003) ("We long ago decided that, at a minimum, a plaintiff who proves a constitutional violation is entitled to nominal damages."); Slicker v. Jackson, 215 F.3d 1225 (11th Cir.2000) (stating that "a § 1983 plaintiff whose constitutional rights are violated is entitled to receive nominal damages even if he fails to produce any evidence of compensatory damages").

[67] Courts have, to be sure, occasionally found that a violation was too slight or technical to warrant an award of nominal damages, a conclusion consistent with the common law doctrine of de minimis non curat lex.

[68] The Court recently confirmed that the standard for municipal liability under section 1983 does not depend on the nature of the relief sought. See Los Angeles County v. Humphries, 131 S. Ct. __ (2010) (concluding that suits for declaratory relief, like those for monetary damages, must establish that a county policy or custom violates the Constitution). In addressing the substantive standard for county liability, the Court relied on settled law and had no occasion to discuss qualified immunity.

[69] Officials named as defendants in actions for injunctive relief may be subject to contempt sanctions if they violate the terms of the injunction. *See, e.g.*, Ex parte Young, 209 U.S. 123 (1908) (upholding a contempt sanction against a state official who violated an injunction). Such sanctions might threaten a form of personal liability.

to clarify the constitutional norm and would not address whether the norm in question had been clearly established in earlier litigation.[70]

Such a stand-alone action for nominal damages would represent something of a novelty in constitutional tort litigation. But the proceeding has a fairly strong foundation in existing law. First, it has long been settled that a claimant may waive or forgo claims for compensatory and punitive damages and pursue nominal damages alone.[71] Second, the decision of the plaintiff to waive all but nominal damages does not call into doubt the existence of a genuine case or controversy within the meaning of Article III; courts treat an action for nominal damages as a live dispute that satisfies the requirements of justiciability.[72] Third, courts have regarded the judgments rendered in such proceedings as binding, according them both stare decisis and claim preclusive effect.[73] These conclusions cohere with the notion that an action for nominal damages was in

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[70] Such an approach would resemble that followed in the early Republic, when courts passed upon legal issues without inquiring into the good faith of the officer. *See* Pfander & Hunt, *supra* note 3, at 1922-29.

[71] *See* Daniels v. Bates, 2 Greene 151, (Iowa 1849) (upholding the right of the plaintiff to waive any claim for compensatory damages and seek only nominal damages "as a self-evident proposition, too obvious to be questioned," even where such waiver defeats the defendant's right to recover the cost of improvements by way of set-off); High v. Johnson, 28 Wis. 72, (1871) (allowing plaintiff to waive claim to actual damages and secure a nominal verdict from jury that found an invasion of plaintiff's legal rights); Boon v. Juliet, 1 Scam. 258, 2 Ill. 258 (1836) (upholding right of the plaintiff to waive an inquest to ascertain damages and to take judgment for nominal damages alone); Connecticut & P.R.R. Co. v. Holton, 32 Vt. 43, 48 (1859) (permitting plaintiffs to waive all but nominal damages and thereby remove certain issues from the litigation). *Cf*. Hanson v. Madison Serv. Corp., 150 Wis. 2d 828, 443 N.W.2d 315 (1989) (plaintiff waived claims for compensatory and punitive damages but may still recover nominal damages).

[72] *See, e.g.*, Utah Animal Rights Org. v. Salt Lake City Corp., 371 F.3d 1248 (10th Cir. 2004) (collecting authority); Yniquez v. Arizona, 974 F.2d 646, 647 (9th Cir. 1992) (nominal damages claim saves controversy from mootness); *cf*. Calhoun v. DeTella, 319 F.3d 936 (7th Cir. 2003) (concluding that PLRA plaintiff can pursue an Eighth Amendment claim for nominal damages alone); *but see* Morrison v. Board of Educ. Of Boyd County, 521 F.3d 602 (6th Cir. 2008) (holding, over cogent dissent, that nominal damage claim was insufficient to save a first amendment claim from mootness in the wake of a school board policy change).

[73] Just as a declaratory judgment action results in a definitive, binding, and claim preclusive resolution of the legal issue, so too the action for nominal damages results in the entry of a preclusive judgment. See Harvey v. Mason City R. Co., 129 Iowa 465, 105 N.W. 958 (18__) (describing the adjudication of a nominal damage trespass claim as binding in any later case that might arise). *See generally* Kevin M. Clermont, *The Common Law Counterclaim Rule: Creating Effective and Elegant Res Judicata Doctrine*, 79 Notre Dame L. Rev. 1745 (2004) (discussing the preclusive effect of default judgments under the Second Restatement's common law counterclaim rule).

many respects an early precursor to the declaratory judgment proceeding and was recognized as such.[74] Today, no one questions the power of the federal courts to declare the rights of the parties in a case of actual controversy.[75]

### *B. Nominal Damages and Qualified Immunity*

Although the viability of constitutional tort claims for nominal damages seems beyond dispute, the key to this essay's proposal lies in its suggestion that such claims should not give rise to a qualified immunity defense. That argument may strike some readers as self-evident; the Court created official immunities for the express purpose of providing officers with protection from personal liability and the actions under consideration pose no real threat of such liability.[76] But several factors complicate the straightforward claim that the personal liability origins of qualified immunity make the doctrine inapplicable to nominal claims.

To begin with, although the Supreme Court has never ruled on the issue,[77] the lower federal courts assume that the defense of qualified immunity applies to claims for nominal damages.[78] While those decisions do not address the question

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[74] *See* DOBBS, supra note , at 221-222 (characterizing the action for nominal damages as the functional equivalent of a declaratory judgment action); *see also* Rodney A. Smolla, Law of Defamation § 9:6 (2d ed. 2003) (likening nominal damages to action for a declaratory judgment). In a wide variety of cases, courts order both declaratory and injunctive relief and award nominal damages. *See, e.g.*, Ford v. Chicago & Nw. R. Co., 14 Wis. 609 (1861).

[75] On the acceptance of the declaratory judgment action, see H & W, supra note 1, at 56-7.

[76] *Cf.* Butz v. Economou, 438 U.S. 478 (1978) (evaluating immunity defense in the context of an action for $35 million).

[77] In *Carey* itself, the lower courts had rejected the qualified immunity defense and the defendants did not appeal from that determination. *See* Piphus v. Carey, 545 F.2d 30, 31 n.2 (7th Cir. 1976) (lower court found that the right to a hearing was well established, thus overcoming any qualified immunity defense, and the defendants did not appeal from that determination), *rev'd on other grounds*, Carey v. Piphus, 435 U.S. 247 (1978). For this reason, and because the claimants sought substantial compensatory damages, the Court thus had no occasion to decide whether qualified immunity applied to the kind of stand-alone claim for nominal damages considered in this essay.

[78] *See* Taylor v. Michigan Dept of Natural Resources, 502 F.3d 452 (6th Cir 2007) (treating qualified immunity as applicable to nominal damages claims); Richmond v. City of Brooklyn Center, 490 F.3d 1002 (8th Cir. 2007) (same); Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003) (same). A variety of unpublished opinions, available on Westlaw, assume the applicability of immunity analysis to claims for nominal damages. *See, e.g.*, Eloy v. Guyot, 289 Fed. Appx. 339 (11th Cir. 2008); Harper v. Poway Unified School District, 318 Fed. Appx. 540 (9th Cir. 2009).

raised by this essay's proposal,[79] they provide some support for the doctrine's application.[80] In addition, the doctrine of qualified immunity has evolved from its origins as a protection against personal liability. In later decisions, the Court broadened the immunity to protect the officer from the burden of trial, rather than just the threat of liability.[81] To the extent the action for nominal damages implicates the Court's burden-of-litigation rationale, such actions may trigger the

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[79] *See* cases cited in note 78 *supra*. Notably, in all these cases, the plaintiffs sought compensatory or punitive damages or both in addition to the nominal claims. As a consequence, the lower federal courts treated the claims as posing a genuine threat of personal liability and reflexively assumed that the doctrine of qualified immunity applied. The decisions shed little light on the qualified immunity consequences of an action that announces, at the outset, a waiver of all damages other than the nominal. Even in Padilla v. Yoo, 633 F. Supp. 2d 1005 (2009), where the complaint specifically sought only nominal damages and attorney's fees, a threat of compensatory and punitive damages may loom for the defendant. Under the rules of procedure, the district court should "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). Padilla's complaint apparently anticipates the application of that rule, requesting that the court award nominal damages, attorney's fees, and other "appropriate relief as the [c]ourt may determine to be just and proper." Some cases hold that a party who fails to request nominal damages expressly may not assert them in a last-ditch effort to stave off dismissal. *See, e.g.,* Davis v. D.C., 158 F.3d 1342, 1349 (D.C. Cir. 1998) (affirming district court's *sua sponte* dismissal of the plaintiff's complaint for damages despite the possibility that nominal damages could be awarded, because the complaint requested only statutorily unavailable compensatory and punitive damages); Fox v. Board of Trustees of State University of New York, 42 F.3d 135 (2d Cir. 1994) (concluding that an action that sought only declaratory and injunctive relief cannot be saved from mootness by the assertion of a belated claim for nominal damages and suggesting the importance of the nature of the claims asserted in the complaint) Goichman v. City of Aspen, 590 F. Supp. 1170, 1173-74 (D. Colo. 1984) (rejecting attempt to make belated assertion of nominal damages to avoid mootness where no such claim appeared in the complaint). R. S. & V. Co. v. Atlas Van Lines, 917 F.2d 348, 351 (7th Cir. 1990) (concluding that contract claim was moot in the absence of any claims for actual or nominal damages).

[80] *See also* Hopkins v. Saunders, 199 F.3d 968, 976-78 (8th Cir. 1999) (concluding that immunity applies to actions at law, such as claims for compensatory and nominal damages, but not to such equitable proceedings as those for declaratory and injunctive relief). While the Eighth Circuit's law-equity distinction represents the only considered evaluation of the issue, it does not provide a very useful test for evaluating when immunity attaches to proceedings against government officers. After all, litigants have frequently brought legal actions against federal officials to which the qualified immunity doctrine does not apply. Thus, in resolving both the mandamus proceeding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 337 (1803), and the ejectment proceeding in *United States v. Lee*, 106 U.S. 196 (1882), the Court disclaimed any doctrine of official immunity. Claims at law for improper exaction of customs duties were also permitted to proceed without any defense of official immunity. *See* Irving v. Wilson, 4 Term R. 485, 100 Eng. Rep. 1132 (K.B. 1791); Elliot v. Swartwout, 35 U.S. (10 Pet.) 137 (1836).

[81] *See* Iqbal v. Ashcroft, 129 S. Ct. 1937, 1953-54 (2009) (noting the importance of protecting high-level government officials from the burden of even minimal and targeted discovery); *see also* notes 93-97 infra and accompanying text (discussing the immunity rules articulated in *Harlow v. Fitzgerald* and *Mitchell v. Forsyth*).

immunity defense. Finally, the Court's recent hostility to *Bivens* litigation might lead some to predict that, with whatever doctrinal justification, it will reflexively extend immunity defenses to nominal claims.[82]

But the Court's qualified immunity decisions do not all point in one direction. Thus, the Court has rejected the government's argument for an absolute immunity from liability, emphasizing the *Marbury* principle of assured remediation. Similarly, the Court has refused to broaden interlocutory review of rejected qualified immunity claims, recognizing that immunity must occasionally give way to other values.[83] Indeed, on looking beneath the surface of the Court's judge-made immunity law,[84] the decisions reveal three leading principles: (i) the doctrine should preserve some meaningful opportunity for the victims of constitutional wrongdoing to obtain a vindication of their rights; (ii) the doctrine should protect officers and government agencies from some (but not all) of the burdens associated with constitutional litigation; and (iii) the doctrine should avoid stagnation by giving federal courts an opportunity to reach the merits of a reasonable number of constitutional tort claims. One finds these principles reflected in such leading decisions as *Butz v. Economou*,[85] *Harlow v. Fitzgerald*,[86] *Saucier v. Katz*,[87] and *Pearson v. Callahan*.[88]

The *Butz* decision nicely illustrates the Court's devotion to the preservation of some reasonable opportunity for individuals to vindicate their constitutional rights. There, the Court considered a claim that the former secretary of Agriculture, Earl Butz, violated the constitutional rights of Arthur Economou, a commodities dealer, by approving his suspension from trading in a

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[82] See notes 112-14 infra and accompanying text (discussing *Wilkie v. Robbins*, 551 U.S. 557 (2007); *Hui v. Castaneda*, 130 S. Ct. 1845 (2010), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)).

[83] *See* Johnson v. Jones, 515 U.S. 304 (1995) (declining to extend collateral order review to fact-bound qualified immunity defenses); *cf.* Johnson v. Frankell, 520 U.S. 911 (1997) (rejecting the contention that federal law requires state courts to provide collateral review of rejected immunity defenses).

[84] The Court's willingness to craft a judge-made body of immunity law represents a natural outgrowth of its decision to create a federal common law right of action in *Bivens*. *See* Pfander, supra note 8, at __; *see also* Butz v. Economou, 438 U.S. 478, 502-03 (1978) (observing that immunity from government liability has "in large part been of judicial making").

[85] Butz v. Economou, 438 U.S. 478 (1978).

[86] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[87] Saucier v. Katz, 533 U.S. 194 (2001).

[88] Pearson v. Callahan, 129 S. Ct. 808 (2009).

regulated futures market. The government argued that Butz, as a Cabinet level official, should be given absolute immunity from suit, but the Court opted instead for a qualified immunity that was said to depend on the clarity with which constitutional rights were established and the evidence that the official defendant acted in good faith. As Justice White explained, the Court could find no reason for giving federal officers greater immunity from a *Bivens* claim than state officers enjoy from suit under section 1983.[89] Indeed, the *Bivens* right of action would be "drained of meaning" if officers were accorded an absolute immunity.[90]

If *Butz* emphasizes the *Marbury* principle of assured remediation,[91] then *Harlow v. Fitzgerald* reflects the Court's willingness to tailor immunity to offer a greater measure of protection to government officials sued in their personal capacity.[92] Early versions of official immunity in the 1970s offered protection to officers who acted in good faith within the limits of their authority. The Court justified these early versions by highlighting the potential unfairness of imposing liability in cases where official duties require officers to exercise discretion and the concern that liability would deter the officer from acting with the decisiveness required by the public good.[93] Later, the Court recognized that the focus on the official's good faith created a factual issue that often required the officer to submit to trial. To address that concern, the *Harlow* Court switched to an objective standard of immunity that would facilitate the entry of summary judgment.[94] In justifying its switch, the Court emphasized such "social costs" as

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[89] Butz, 438 U.S. at 500-01.

[90] *Id*. at 501.

[91] *See* Butz, 438 U.S. at 506 (citing *Marbury v. Madison*, U.S. (1 Cranch) 137 (1803)).

[92] While qualified immunity from defamation liability has some foundation in common law privileges, see Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 Harv. L. Rev. 44 (1960), a more general immunity from suit for executive branch officials can claim only the most tenuous common law foundation. In the early nineteenth century, when the Supreme Court imported common law doctrines to assure government accountability, common law immunity rules had no application to such claims. To the contrary, the Court held officers accountable for all illegal conduct in the expectation that the officers would seek indemnification from Congress. After *Spalding v. Vilas*, 161 U.S. 483 (1896), lower courts took a somewhat more expansive view of federal official immunity. *See* Gray, *Private Wrongs of Public Servants*, 47 Calif. L. Rev. 303 (1959).

[93] *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Although it was an action brought against state officials under section 1983, *Scheuer*'s immunity standard was later extended to *Bivens* litigation. *See* Butz v. Economou, 438 U.S. 478, 503-04 (1978).

[94] Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982).

"the expenses of litigation."[95] The Court expanded on the burden of litigation rationale in *Mitchell v. Forsyth*, allowing a Cabinet official to seek interlocutory appellate review of the denial of a qualified immunity defense.[96] At least for purposes of interlocutory review in the federal system, qualified immunity was to be regarded as an "immunity from trial" rather than simply an immunity from liability.[97]

A third concern in the Court's management of qualified immunity has been to preserve the law-saying function of the federal courts.[98] In *Saucier v. Katz*, the Court emphasized the concern with the preservation of the common law function of courts in elaborating the rules of constitutional law.[99] It did so, as we have seen, by inflexibly mandating a two-step decision rule that requires the trial court, when faced with an immunity defense, first to determine whether the facts alleged make out a constitutional violation and only then to determine whether the constitutional law in question has been established with the clarity needed to overcome qualified immunity.[100] Such a merits-first order of battle was said to enable the federal courts "to elaborate the constitutional right with greater degrees of specificity."[101] It operated to limit the frequent tendency of lower courts to avoid the constitutional claim at issue by pointing to conflicting authority and concluding that the law lacked the clarity necessary to overcome the official's *Harlow* immunity.

More recently, in *Pearson v. Callahan*, the Court abandoned the inflexible *Saucier* order of battle and substituted a regime of discretion under which lower courts can reach the merits, if they choose, or resolve the case on the basis of a lack of clarity.[102] In doing so, the *Pearson* Court expressed concern with some consequences of *Saucier*'s inflexibility but reaffirmed the general value of

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95 Id. at 814 (citations and quotations omitted).

96 See Mitchell v. Forsyth, 471 U.S. 511 (1985).

97 On the Court's reluctance to expand the *Mitchell* rule of interlocutory review, see cases cited in note 83 supra.

98 For an account of the way the Supreme Court's effort to maintain its law-saying role resembles that of the European Court of Justice, see James E. Pfander, Köbler v. Austria: *Expositional Supremacy and Member State Liability*, 17 EUR. BUS. L. REV. 275 (2006).

99 Saucier v. Katz, 533 U.S. 194 (2001).

100 Id. at 201.

101 Id. at 207.

102 Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

enabling the lower courts to develop the law.[103] The Court specifically called attention to the need for such development in cases that do not frequently arise;[104] simple scarcity alone might prevent the development of a body of law well enough established to provide guidance to officials and protection to the victims of alleged wrongdoing.[105]

Applying the principles in these leading cases, one can make a strong if not altogether airtight argument that the defense of qualified immunity should not apply to suits brought for nominal damages. For starters, the action for nominal damages (if allowed to proceed in the absence of clearly established law) should facilitate judicial resolution of constitutional claims, serving the *Butz* interest in the vindication of constitutional rights. Plaintiffs are likely to pursue such claims in two situations: when they believe that their rights have been violated and they have suffered only a modest or symbolic injury and, in cases of more substantial injury, when they predict that the unsettled quality of constitutional law would prevent them from overcoming the otherwise applicable qualified immunity defense. By allowing the plaintiff to waive the more substantial claim for damages in order to secure the adjudication of the constitutional claim in a world of uncertainty, the proposal would help to clarify and vindicate constitutional norms. Litigants such as Jose Padilla (whose claim against John Yoo remains pending) and Valerie Plame Wilson (whose action against Dick Cheney was dismissed), might have both been willing to forgo claims for compensatory damages in an effort to secure constitutional vindication.[106]

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[103] Id. at 818-22.

[104] Id. at 818.

[105] The desire to provide guidance to officials has long been a feature of the Court's immunity analysis. *See, e.g.,* Wilson v. Layne, 526 U.S. 603, 609 (1999) (explaining that the merits-first order of battle would promote "clarity in the legal standards for official conduct, to the benefit of both the officers and the general public").

[106] *See* Padilla v. Yoo, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009) (rejecting Yoo's qualified immunity defense without relying on the fact that Padilla formally sought only the award of $1.00 in damages) (appeal pending); Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008) (affirming dismissal of Wilson's claim against Vice President Cheney and his aide, Scooter Libby). Symbolic awards count for a great deal among those who feel that their rights were violated. Webster Bivens noted in a conversation that he kept copies of the checks that the defendants issued to him in settlement of his Fourth Amendment claims. See Pfander, *The Story*, supra note 2, at .

By encouraging the adjudication of the merits of unsettled constitutional claims, the action for nominal damages would also advance the *Saucier/Pearson* interest in the articulation and clarification of constitutional norms. As noted above, the *Pearson* Court continued to emphasize the importance of clarifying constitutional law when possible, even as it recognized that lower courts should have discretion to resolve the issue on the basis that the constitutional norm at issue was not well enough established to permit an award of damages. Despite the Court's protestations, critics worry that the new discretionary regime will create renewed problems of stagnation.[107] Empirical work to date tends to bear out this concern.[108] The action for nominal damages offers one solution to the stagnation problem. It would oblige district courts to reach the merits of the constitutional claim even in cases of legal uncertainty, so long as the plaintiff agreed to forgo all but a nominal award.

Finally, by limiting the award to one dollar in nominal damages, the proposal would not pose the threat of ruinous personal liability that gives rise to the qualified immunity defense. Not only does *Carey* limit the award of nominal damages to one dollar, the law has pretty clearly settled the proposition that a successful proceeding for nominal damages does not give rise to an award of attorney's fees. For starters, successful *Bivens* claimants have no statutory right to an award of attorney's fees if they prevail. Even as to constitutional tort claims brought under section 1983, where fee awards are possible, the Court has held that recovery of an award of nominal damages alone does not entitle the plaintiff to significant attorney's fees.[109] The Prison Litigation Reform Act of 1995

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[107] *See* John C. Jeffries Jr., Reversing the Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115.

[108] *See* Paul W. Hughes, *Not A Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. Colo. L. Rev. (2009) (finding that *Saucier* led to an increase in the articulation of constitutional rights); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepp. L. Rev. 667, 670 (2009) (agreeing that Saucier increased articulation of constitutional rights but suggesting that it led to a narrowing of the rights in question); cf. Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 Stan. L. Rev. 523, (2010) (echoing the conclusion that *Saucier* produced more constitutional rulings, but providing data that casts doubt on Leong's finding of a reduction in rights-affirming decisions).

[109] *See* Farrar v. Hobby, 506 U.S. 103 (1992) (defining prevailing party for purposes of the award of attorney's fees to exclude a plaintiff who sought $17 million and recovered only nominal damages and explaining that the fee in a case where only nominals were awarded is usually "no fee at all").

underscores this conclusion, limiting successful litigants to a fee no greater than 1.5 times the award of damages. PLRA plaintiffs who have recovered nominal damages of $1.00 often receive attorney's fees of $1.50.[110] In any case, plaintiffs could presumably waive costs and attorney's fees in the same way that they waive all but nominal damages.

The nominal constitutional tort claim thus strikes a balance among the various policy considerations that inform the Court's qualified immunity jurisprudence. With the threat of liability eliminated, the nominal claim does not threaten the financial prospects of hard-working government employees. At the same time, the nominal claim will permit courts to vindicate constitutional rights and clarify the law, thus avoiding the concern with stagnation that remains in the wake of *Pearson v. Callahan*. Nonetheless, one can predict some hostility to the nominal *Bivens* claim both from the federal government and from courts disinclined to reach the merits of a complex constitutional case at the behest of a plaintiff seeking one dollar. The next part addresses these concerns.

## III. SOME REALISM ABOUT NOMINAL CLAIMS[111]

Despite its doctrinal bona fides, one suspects that the federal government will not welcome the recognition of an immunity-free nominal constitutional tort claim. The Supreme Court may share the government's skepticism to some degree, at least judging by a string of recent pro-government decisions. To mention only the most striking examples, the Court applied a statutory immunity quite broadly in *Hui v. Castaneda*,[112] took a narrow view of the propriety of recognizing new *Bivens* rights of action in *Wilkie v. Robbins*,[113] and extended its plausibility pleading regime to *Bivens* litigation (and other matters) in *Ashcroft v.*

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[110] *See, e.g.*, Corpus v. Bennett, 430 F.3d 912, 916 (8th Cir. 2005) (concluding that the PLRA limits the amount of attorney's fees in a successful action for nominal damages to 150% of the nominal award, or $1.50).

[111] With apologies to Arthur Leff. *See* Arthur Allen Leff, *The Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974).

[112] *See* Hui v. Castaneda, 130 S. Ct. 1845 (2010) (concluding that availability of statutory tort remedy against the government displaced *Bivens* liability).

[113] *See* Wilkie v. Robbins, 551 U.S. 557 (2007) (concluding that special factors counsel hesitation in the recognition of a property-based Fifth Amendment retaliation claim). For an argument that the Court mistakenly assumed the existence of a state law remedy, see Pfander & Baltmanis, supra note 2, at .

*Iqbal*.[114] One might predict that, with whatever doctrinal justification, the Court will incline toward the government's opposition to any development aimed at facilitating constitutional tort litigation. This part of the essay evaluates the likely contours of nominal tort litigation and explains why such claims should not trigger a skeptical response.

### *A. Understanding the Likely Contours of Nominal Constitutional Tort Litigation*

Who will bring a nominal constitutional tort claim? Under the terms of the proposal in this essay, the complaint must clearly state that the plaintiff wishes to pursue a claim for nominal damages alone and must waive any claim to compensatory and punitive damages, costs and attorney's fees. The required waiver of damages, costs and fees will doubtless limit the universe of prospective claimants. As a practical matter, individuals who have suffered substantial physical, psychological, or dignitary injuries as the result of allegedly unconstitutional conduct will find the pursuit of nominal damages unattractive. The waiver of compensatory and punitive damages would eliminate the prospect of any significant recovery and, with it, the services of contingency fee lawyers. Plaintiffs who wish to pursue a claim for substantial damages will predictably take their chances with the qualified immunity defense or assert immunity-free claims under the FTCA or both.[115]

Some federal prisoners will doubtless pursue nominal claims, alleging unconstitutional conditions of confinement, religious discrimination, and a range of other claims.[116] But the availability of nominal claims does not appear likely to bring many *new* cases to the federal courts. Much prison litigation occurs in the context of relatively well established law, and turns on disagreement about what

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[114] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (casting doubt on the viability of a *Bivens* claim for discrimination on the basis of religious affiliation). For doubts that the Court's doubts were well founded, see Pfander, supra note 8, at .

[115] The Federal Tort Claims Act authorizes suit against the federal government for a range of torts committed by federal officials in the scope of their employment. *See* 28 U.S.C. 1346. While the statute provides remedies for certain intentional tort by law enforcement officers, and thus overlaps to some extent with constitutional tort claims under the *Bivens* doctrine, the Supreme Court has held that the existence of remedies under the FTCA are supplemental to, rather than preemptive of, *Bivens* remedies. *See* Carlson v. Green, 446 U.S. 14 (1980).

[116] *See, e.g.*, Brundage v. United States Information Agency, 248 F.3d 1156 (7th Cir. 2000) (affirming dismissal of pro se complaint).

happened as a factual matter. Was the prisoner beaten, or merely restrained? Had the prisoner engaged in conduct justifying some form of physical restraint, or did the prison guard act in retaliation or for other unconstitutional reasons? In factually rich cases, where questions of degree and motive take center stage, the plaintiff would gain little by trying to side-step qualified immunity through the assertion of a nominal claim. Qualified immunity has little relevance to such claims; much turns on whether the prisoner can produce sufficient factual support to create an issue for the trier of fact to resolve.[117] As a result, one can predict that the nominal claim will have limited appeal for many *pro se* litigants. If the prisoner succeeds in showing an unprovoked physical assault, the guard will face personal liability. Prisoners would gain little in such cases by agreeing at the outset to pursue only nominal claims.

The government might nonetheless worry that eliminating the qualified immunity defense would invite more prisoner claims and would make existing claims more difficult to defend. While some change in the mix of cases may result, two factors will limit the degree to which the recognition of a nominal *Bivens* claim will invite new, unwarranted prison litigation. First, the PLRA already puts in place a number of reforms aimed at curtailing frivolous prison litigation.[118] These include the required payment of a filing fee, the three strikes provision, the exhaustion requirement, and the required judicial screening that leads to the dismissal of many petitions at the threshold.[119] Second, prisoners subject to ongoing confinement can already pursue claims for declaratory and injunctive relief.[120] As we have seen, such *Ex parte Young*–style claims trigger an adjudication of the constitutional merits without regard to any qualified immunity defense. Recognition of a nominal *Bivens* claim would occasion little expansion in this category of litigation.

To be sure, the proposal would allow some former detainees to press claims for nominal damages that they could not (on standing grounds) pursue as

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[117] *See* Reinert, supra note 2, at 843-44 (observing that qualified immunity defenses play a more modest role in the dismissal of *Bivens* claims than previously believed and hypothesizing that much *Bivens* litigation arises in the context of well-established law).

[118] For a summary of PLRA restrictions on prison litigation, see .

[119] *See* Reinert, supra note 2, at 840 (reporting that 20% of the *Bivens* claim examined in the study were dismissed at the screening stage and thus imposed only a modest litigation burden on the government or the official named as a defendant).

[120] *See* note __ supra.

actions for declaratory or injunctive relief. One supposes, however, that most prisoners who have gained release from prison would prefer to get on with their lives, rather than pursue prison grievances for an award of nominal damages. Only former detainees like Jose Padilla, who have suffered what they regard as a severe constitutional violation and hope to secure judicial vindication, would likely pursue nominal claims after gaining their release from confinement. But the economics of such litigation suggests little reason to predict an increase in unwarranted claims.

The economics confronting other potential nominal claimants (aside from current prisoners) would not lead one to predict a flood of nominal damages litigation. Few persons of modest means can afford to pursue constitutional clarification as a hobby or public service. Such litigation will often depend on the financial support of public interest groups and other third parties who have an institutional interest in underwriting the cost of symbolic or expressive constitutional litigation.[121] (The motivation underlying such expressive litigation – to secure an articulation of constitutional norms in an area of uncertainty – closely resembles that underlying actions for declaratory and injunctive relief.) By hypothesis, the plaintiffs (and their lawyers) will have concluded that the unsettled quality of current law would likely afford the responsible official an immunity defense. In such a case, the plaintiff's willingness to surrender any claim for actual damages and pursue a nominal action provides important information about the nature of the constitutional challenge. We would expect only serious claimants to seek such vindication, and we would expect them to do

[121] Public interest groups (perhaps most famously, the NAACP) often finance cause-based or ideological litigation brought in the name of affected individuals. *See* NAACP v. Button, 371 U.S. 415, 471 (1963) (recognizing that, for some groups, "association for litigation may be the most effective form of political association"). Such litigation has long been studied, decried, and applauded. For a summary of the vast literature, see Paul B. Stephan III, *A Becoming Modesty: U.S. Litigation in the Mirror of International Law*, 52 DePaul L. Rev. 627 (2002). Another form of ideological litigation may have increased in recent years; political opponents may finance constitutional tort litigation to embarrass or undermine the work of elected officials. *See* Clinton v. Jones, 520 U.S. 681 (1997) (allowing claims of sexual misconduct to proceed after concluding that absolute presidential immunity does not bar an action brought against sitting president in connection with past conduct as state governor); Browning v. Clinton, 292 F.3d 232 (D.C. Cir. 2002) ((reinstating claims that former President Clinton tortiously interfered with a former mistress's attempt to publish an account of her longtime affair with him); Alexander v. Federal Bureau of Invest., 971 F. Supp. 2d 603 (D.D.C. 1997) (concluding that "file-gate" claims could proceed against Hillary Clinton for improper use of FBI files). Others may view this litigation as reflecting more on the character of its targets than on the motives of its financial backers.

so only when they confront either an absence of law or some disagreement among the lower federal courts. Such claims, though uncommon, seem especially likely to provide a useful source of law-clarification.

What's more, the unsettled quality of the law should not unduly complicate the litigation process. Discovery may, of course, be necessary to the determination of constitutional claims and discovery will impose burdens on both the plaintiff and the government official. But the government can still pursue summary dismissal of the claim either at the pleading or summary judgment stage on the theory that the plaintiff has failed to set out or support the elements of a viable constitutional claim. Notably, the *Iqbal* pleading regime would plainly apply to nominal constitutional tort claims, thus assuring the government a fairly rich factual record on which to base its motions to dismiss.

### *B. Counter-Intuitive Advantages and Concerns*

Despite its many appealing features and its tendency to pose only a modest threat to federal dockets, recognition of a nominal constitutional tort claim may produce some unexpected consequences that deserve consideration. Counter-intuitively, some supporters of constitutional litigation may worry about the impact of a nominal option on the development of qualified immunity law. The worry might run something like this: courts will view straight *Bivens* litigation for compensatory and punitive damages with an even more skeptical eye, taking the position that doubtful claims should be resolved through nominal litigation rather than through the threat of personal liability. On this view, critics may worry that plaintiffs will find it even more difficult to obtain compensation for constitutional torts than they do at present. In other words, if the Supreme Court were to confirm the nominal option for plaintiffs, the federal courts may come to regard that option as the preferred mode of constitutional litigation and look with disfavor on other options.

I share this concern to some degree and the perception that the law of qualified immunity now makes it too difficult to secure a vindication of constitutional rights. I also agree that the law in this area errs in providing too little protection for plaintiffs rather than in casting too great a burden on the government. If I were invited to suggest a legislative solution to the current imbalance, I would not too quickly embrace the expansion of nominal litigation as

a tool to overcome qualified immunity. It might make more sense to tackle qualified immunity directly and to improve the effectiveness of the system of indemnification. Nominal damage claims thus represent something of a stopgap measure, responsive to the desire for law-clarification at a time when the Court appears unlikely to rethink its broad, and perhaps still growing, doctrine of qualified immunity.

Reliance on nominal damages might lead to a modest but unexpected reduction in the burden of constitutional tort litigation by shifting the focus away from high-ranking officers to the low-level officials who carried out the contested policy. Such a model of low-level litigation now prevails in the habeas context, where the Court's immediate custodian rule serves to focus litigation at the warden level even as it facilitates a full inquiry into the legality of the government's contested custody policy.[122] The Court has suggested that it would prefer such a focus in the *Bivens* context as well; indeed, its recent decision in *Iqbal v. Ashcroft* may make it more difficult to impose liability on supervisory officials.[123] Despite *Iqbal*, in the current world of *Bivens* litigation, supervisory and Cabinet-level officials remain relatively attractive defendants; they're more likely than low-level counterparts to have substantial personal assets with which to pay any eventual judgment and thus more likely to respond to settlement pressure. Nominal claims do not seek to impose substantial personal liability and thus tend to make the low-level and high-level officials equally attractive as potential defendants. While politically motivated claimants may continue to target high-level defendants, the economics of nominal litigation could offer a modest corrective to this tendency.

The prospect of indemnity suggests one final possible outgrowth of the proposal to recognize immunity-free nominal claims. A successful claimant in nominal litigation might later pursue compensation by filing a petition with Congress for the adoption of a reparations bill. The claimant might argue that the

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[122] *See* Rumsfeld v. Padilla, U.S. (2004) (reasserting the immediate custodian rule as the default model for habeas litigation that seeks to challenge the legality of executive detention).

[123] *See* Iqbal v. Ashcroft, 129 S. Ct. 1937 (2009) (reaffirming the inapplicability of respondeat superior liability in the *Bivens* context and holding that supervisors can be held liable only for their own violations of the plaintiff's constitutional rights); *cf.* Kit Kinports, *Supervisory Immunity*, 114 PENN. ST. L. REV. ___ (2010) (suggesting that supervisory liability will require a showing that the supervisor engaged in unconstitutional conduct, a showing that might vary with the claim being asserted).

finding of liability suggests an invasion of rights for which some form of compensation or reparation would be appropriate. Congress has made reparations payments in the past, perhaps most notably to the Japanese Americans who were interned during World War II. Successful nominal claimants might mount a similar claim for some form of recompense. (Needless to say, Congress would make any such payments in its discretion from the US Treasury; the possibility would not undermine the immunity-free quality of the nominal claim.)

If successful, such an appeal to Congress would, to some extent, return the law of government accountability to its early nineteenth century roots. As I have explored in another context, the early Republic had a fairly clear division of responsibility: courts were to evaluate the legality of government conduct (without regard to the clarity with which they had previously articulated the applicable principle of law) and Congress was in charge of ensuring that victims received compensation and officers were protected from personal liability.[124] Congress accomplished this goal through the adoption of private bills of indemnity running in favor of the officer or the victim, whichever had borne the loss.[125] No one today (perhaps especially the members of Congress who would bear responsibility for the legislation) would welcome reliance on Congress for the case-by-case compensation of victims of federal government misconduct. But a practice of petitioning might persuade Congress to transfer responsibility for compensation to the federal courts.[126]

## IV. CONCLUSION

One can certainly sympathize with the government's perception that *Bivens* litigation serves more often to harass than to edify. One can also see that *Pearson v. Callahan* and the doctrine of qualified immunity will pose an important challenge to the ability of plaintiffs to secure an adjudication of their constitutional claims. In suggesting a new model of nominal constitutional tort litigation, this short essay seeks to clear the way for the assertion of a nominal claim that will broaden the law-saying power of the federal courts without posing a threat to well-meaning government officials. While it will not appeal to all

[124] *See* Pfander & Hunt, supra note 3, at .
[125] Id. at (describing Congress's willingness to structure payments directly to victims when the officer had disappeared or become insolvent).
[126] Congress adopted both the Tucker Act and the Federal Tort Claims Act in part to shift the responsibility for passing upon public claims to the courts.

plaintiffs, the proposal will allow individuals to secure an adjudication of constitutional claims in a world of legal novelty or uncertainty. It thus offers one way to achieve what the Court has long described as the proper balance between the vindication of constitutional rights and the protection of those who act on behalf of the government.